IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 117

THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and All Others Similarly Situated,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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Comes now Otto R. Coburn, on behalf of himself and all others similarly situated, and requests that petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming an order of the United States District Court for the District of Kansas be denied.

I.

STATEMENT

For the purposes of this proceeding, respondent accepts as accurate petitioner's statements in its petition under the captions: OPINIONS BELOW, JURISDICTION, QUESTION PRESENTED, STATUTE AND RULES INVOLVED, and STATEMENT, with the exception of a part of the last paragraph under the caption STATEMENT, where it is said:

> "The court below answered the question in the affirmative, after conceding that aggregation of the claims here involved was not permissible under former Rule 23. It specifically declined to follow the holding in *Alvarez* v. *Pan American Life Insurance Co., et al.*, 5 Cir., 375 F.2d 992, certiorari denied, 389 U.S. 827, that the amendment to Rule 23 had no effect upon jurisdiction." (Petition for Cert., p. 5).

The Court below actually held that Rule 23 of the Federal Rules of Civil Procedure did not affect the principle of aggregation either before or after its amendment (Appendix, p. A5).

II.

ARGUMENT

We will respond to petitioner's "REASONS FOR GRANTING THE WRIT" in the order followed by petitioner.

1. We must admit that the decisions by the District Court and the Court of Appeals for the Tenth Circuit conflict with the decision by the Court of Appeals for the Fifth Circuit in *Alvarez* v. *Pan American Life Insurance Co., et al.*, 5 Cir., 375 F.2d 992, certiorari denied, 389 U.S. 827. The Court of Appeals, in the latter case, concluded

that the principle of aggregation was within the scope of jurisdiction which, in turn, was restricted to the powers of Congress and outside the rule-making power of the Supreme Court. From this the Court concluded that plaintiffs, with claims separate and distinct, could not aggregate in order to satisfy the jurisdictional amount. It would seem, however, that the Fifth Circuit was not satisfied with the result of its decision because the Court concluded its comments as to aggregation of claims for jurisdictional purposes by stating:

> ". . . an accommodation of jurisdiction to the class action procedure, if deemed necessary, is a question which addresses itself to the Congress or the Supreme Court." *Alvarez* v. *Pan American Insurance Co., et al.*, supra, p. 996.

The jurisdictional limitation of $10,000.00 is statutory in origin.[1] The principle of aggregation has been established, not by statute, but by case decisions. *Gibbs* v. *Buck*, 307 U.S. 66, *Pinel* v. *Pinel*, 240 U.S. 594. We agree that the principle of aggregation for jurisdictional purposes is one of long standing. However, we do not agree that this principle is outside the rule-making power of the courts as concluded by the Court of Appeals in the *Alvarez* case. Such is the position taken by the Court below:

> "Because the claims of the individuals constituting the class in the case at bar are neither 'joint' nor 'common' this action under Rule 23 before amendment[3] would not have been classified as a 'true' class action and aggregation of claims would not have been permitted. See *Aetna Ins. Co.* v. *Chicago Rock Island & Pac. R. R.*, 10 Cir., 229 F.2d 584. The Fifth Circuit in *Alvarez* v. *Pan American Life Ins. Co.*, 375 F.2d 992, has held that this result is still dictated after adoption

1. 28 U.S.C. 1332.

of the new rule. Citing *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,[4] the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in 'a *sub silentio* manner.' 375 F.2d at 995. We must respectfully disagree. It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In *Gibbs* v. *Buck*, 307 U.S. 66, 72, the Supreme Court stated it thus:

> '. . . federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value.'

Rule 23 before or after amendment does not purport to affect this principle." (Appendix, pp. A4-A5)

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3. The rule then provided in pertinent part: '(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.'

4. 'These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . .'

Petitioner points out that the Court of Appeals for the Eighth Circuit in *Snyder* v. *Harris*, 390 F.2d 204, followed the *Alvarez* case and is, therefore, in conflict with the decisions by the Court below in this matter. We cannot disagree with that statement, but we do point out that the Court of Appeals, in the *Snyder* case, was probably unaware of the decision in this case and was not afforded the opportunity to reflect upon the opinion of our Court of Appeals because the decision was handed down only four days before the decision in *Snyder*.

Clearly, there is a conflict between decisions of the Courts of Appeals for the Tenth Circuit and the Fifth and Eighth Circuits. However, the conflict involves a narrow point of federal procedure. Only three of the Circuits have ruled on the question, and the majority of the Circuits have yet to speak. None of the other Circuits, including the Fifth and the Eighth, have had the opportunity to address themselves to the position taken by the Court below. It would undoubtedly be helpful and the Supreme Court would be afforded a more comprehensive study in determining this question after the conflicting opinions are tested by careful analysis in the remaining jurisdictions. It may be of interest to the Supreme Court that the Honorable Peter Woodbury of the First Circuit sat, by designation, on the Court below and concurred in the opinion.

This case does not involve a question of constitutional rights, nor does it involve a federal question of substantive law. This suit is between private citizens whose substantive rights will be determined by the laws of the state of Kansas. Any conflict between the Circuit Courts of Appeals is not so serious at this time to warrant review by the Supreme Court.

2. We have already commented in part on petitioner's allegation that the decision by the Court below, in this

matter, is an unwarranted extension of federal jurisdiction in violation of Rule 82 of the Federal Rules of Civil Procedure. Petitioner assumes since more litigants might avail themselves of the federal forum, it necessarily follows that federal jurisdiction has been extended. Rule 23, as amended, eliminates the three cumbersome categories of class actions, *true, spurious,* and *hybrid,* that existed previously. Now, as was true before the amendment, class actions are statutory in nature, and aggregation was permitted only in true class actions. *Matlaw Corporation* v. *War Damage Corporation,* 7 Cir., 164 F.2d 281 (1947); *Fuller* v. *Volk,* 3 Cir., 351 F.2d 323 (1965). Aggregation was not permitted in *hybrid* and *spurious* actions. *Pinel* v. *Pinel,* supra. *Hybrid* and *spurious* class actions were, when analyzed, not actually class actions but were permissive joinder actions whereby plaintiffs were allowed to join together even though their claims were separate and distinct. The effect of the amendment to Rule 23 is to eliminate the categories of *spurious* and *hybrid.* Rule 23, as amended, corrects the anomaly that previously existed when class actions were categorized as *true, spurious* or *hybrid.* In theory, although not in practice, there was only one real class action, the *true* class action, prior to the amendment and that is still true under Rule 23, as amended.

The principle of aggregation, and the substantive law pertinent to it, arose from case decisions, not by statute. To say that the courts cannot now deviate from those decisions because it would be an extension of federal jurisdiction contrary to Rule 82, we submit, is an unwarranted restriction on the powers of the courts.

Petitioner also ignores that part of Rule 82 which provides that the Federal Rules of Civil Procedure shall not be construed to limit the jurisdiction of the United States District Courts. The Supreme Court found it neces-

sary and appropriate to revise Rule 23. We suggest that in the event the plaintiffs, in a class action, meet the prerequisites set out in Rule 23, that it would be an improper limitation of federal jurisdiction to then deny them the right to bring the action in Federal Court because the amount in controversy of each individual plaintiff is less than the jurisdictional amount.

The Court below considered whether its decision would be in violation of Rule 82, and in determining that it would not, said:

> "We find comfort for our view in *Provident Bank* v. *Patterson*, ... U.S. ....., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: '(1) there is a category of persons called "indispensable parties;" (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute.' Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction.". (Appendix, p. A6).

III.

CONCLUSION

Any conflict between the Circuit Courts of Appeals resulting from the decision of the Court below, in this matter, is not so serious as to warrant a review of the matter by the Supreme Court. The question involved is procedural. That question has been decided by the Court below, and the procedure in the Tenth Circuit is, therefore, established. The decision by the Court below does not ex-

tend the jurisdiction of the United States District Courts in violation of Rule 82 of the Federal Rules of Civil Procedure, nor do the implications of the decision below reach beyond the provisions of amended Rule 23 as alleged by petitioner. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January Term, 1968

THE GAS SERVICE COMPANY,
Appellant,

vs.

OTTO R. COBURN, on behalf of himself and all others similarly situated,
Appellee.

No. 9635

Appeal from the United States District Court for the District of Kansas

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Gerrit H. Wormhoudt (Robert L. Coleman, Kirke W. Dale and Paul R. Kitch were with him on the brief) for Appellant.

William V. Crank (D. Arthur Walker, Richard E. Cook, George B. Collins, Robert Martin, K. W. Pringle, Jr., W. F. Schell, Robert M. Collins, W. L. Oliver, Jr., Tom C. Triplett, Thomas M. Burns and Peter J. Wall were with him on the brief) for Appellee.

Before WOODBURY*, LEWIS and HICKEY, Circuit Judges.

LEWIS, Circuit Judge.

This is an interlocutory appeal authorized in compliance with 28 U.S.C. § 1292(b) to allow appellate consideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. § 1332 where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption outside the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding $10,000, and that such individual

*Of the First Circuit, sitting by designation.

claims are variable in amount[1] but would aggregate to more than $10,000.

The trial court found, and it seems indisputable, that plaintiff's action definitely meets each prerequisite to a class action as presently set out in Rule 23(a) and one or more of the additional requirements of 23(b).[2] The class

1. By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was $7.81.

2. The amended Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

is numerous, a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment[3] would not have been classified as a "true" class action and aggregation of claims would not have been permitted. *See* Aetna Ins. Co. v. Chicago Rock Island & Pac. R.R., 10 Cir., 229 F.2d 584. The Fifth Circuit in Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, has held that this result is still dictated after adoption of the new rule. Citing Clark v. Paul Gray, Inc., 306 U.S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,[4] the Fifth Circuit rea-

3. The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

4. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

soned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F.2d at 995. We must respectfully disagree.

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In Gibbs v. Buck, 307 U.S. 66, 72, the Supreme Court stated it thus:

> ". . . federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.[5] The Advisory Committee's Note, 39 F.R.D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true," "hy-

5. Clark v. Paul Gray, Inc., 306 U.S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

brid," and "spurious." "In practice," said the Committee, "the terms 'joint,' 'common,' etc. which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in Provident Bank v. Patterson, ... U.S. ....., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensible parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, Gibbs v. Buck, *supra*, and it follows, under the new rule, that when a cause clearly falls within its

terms as a class action, as here, the claims of the entire class are in controversy.[6]

The judgment is affirmed and the cause remanded for further proceedings.

JANUARY TERM, FRIDAY, FEBRUARY 23rd, 1968.

Before Honorable Peter Woodbury, Honorable David T. Lewis and Honorable John J. Hickey, Circuit Judges.

The Gas Service Company, Appellant, vs. Otto R. Coburn, on behalf of himself and all others similarly situated, Appellee.	Appeal from the United States District Court for the District of Kansas.

9635

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings.

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6. Professor Wright considers this to be a realistic view. He states:

"The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."